FILED

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OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

JANET HARRELSON,

Petitioner,

v.

STEVE SWAN, Chief Probation Officer, Liberty-Chambers Counties Community Supervision & Corrections Department,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 6, 2010

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QUESTIONS PRESENTED

Whether the postconviction review by the Court of Appeals for the Ninth Supreme Judicial District of Texas of the judgments *nunc pro tunc* reopened the convictions so that they were no longer final for 28 U.S.C. § 2244(d)(1)(A) purposes.

Whether the Fifth Circuit violated the doctrine of *stare decisis* by departing from the mandates of the Supreme Court concerning deference to a state court factual finding involved in a federal habeas corpus proceeding.

Whether the Fifth Circuit violated the doctrine of *stare decisis* by departing from the mandates of the Supreme Court concerning the tolling of the AEDPA's statute of limitations.

LIST OF PARTIES

Petitioner certifies that the following is a complete list of names of all parties.

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's June 10, 2010 Judgment and Opinion in this proceeding.

OPINIONS/ORDERS BELOW

The Order of the United States Court of Appeals denying the Petition for Rehearing En Banc entered on July 8, 2010, is attached as Exhibit "E."

The Opinion of the United States Court of Appeals for the Fifth Circuit was entered on June 10, 2010, and from which review is sought is unreported but can be found at 2010 WL 2340827, is attached as Exhibit "A."

The Order of the United States Court of Appeals granting the Certificate of Appealability entered on August 6, 2009, is attached as Exhibit "F."

The Memorandum Order Overruling Petitioner's Objections and Adopting the Magistrate Judge's Report and Recommendation entered on September 9, 2008, from which Petitioner appealed, is attached as Exhibit "B."

The Report and Recommendation of United States Magistrate Judge entered on July 8, 2008, is attached as Exhibit "D."

JURISDICTION

The Order denying the Petition for Rehearing En Banc was entered on July 8, 2010. The Petition for Writ of Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case arises under the Fifth and Fourteenth Amendments to the United States Constitution and 28 U.S.C. § 2244. The constitutional provisions and statute are reprinted in the Appendix as Appendices "G," "H" and "I."

STATEMENT OF THE CASE

On October 22, 2003, after trial by jury in the 253rd Judicial District Court of Liberty County, Texas on which guilty verdicts were rendered, the trial court sentenced the Petitioner in Cause No. 24515 to a term of ten (10) years' imprisonment in the Texas Department of Criminal Justice-Institutional Division, probated for ten (10) years and a fine of $10,000.00 and sentenced the Petitioner in Cause No. 24516 to a term of two (2) years' incarceration in the Texas Department of Criminal Justice-State Jail Division, probated for five (5) years and a fine of $5,000.00. Both sentences were to be served currently. (1 C.R. 11-15; 2 C.R. 6-10.)

After all of the Petitioner's direct state appellate remedies were exhausted, the Court of Appeals for the Ninth Supreme Judicial District of Texas, on

December 27, 2005, issued mandates concerning the Petitioner's appeals in Cause Nos. 09-04-00006-CR and 09-04-00007-CR. (1 C.R. 16; 2 C.R. 11.)

On February 2, 2006, the State of Texas filed its Motion to Enter Judgment *Nunc Pro Tunc* seeking to change the date the Petitioner's sentences were to begin. (1 C.R. 17-22; 2 C.R. 12-17.) On March 28, 2006, the state trial court granted the State of Texas' motions and entered judgments *nunc pro tunc* as requested by the State of Texas. (1 C.R. 23-26; 2 C.R. 18-21, 22.) The Petitioner timely perfected her appeal concerning the judgments *nunc pro tunc* to the Court of Appeals for the Ninth Supreme Judicial District of Texas on April 19, 2006. (1 C.R. 28-29; 2 C.R. 23-24.)

On March 7, 2007, Court of Appeals for the Ninth Supreme Judicial District of Texas reversed and remanded the judgments *nunc pro tunc* with instructions to reinstate the original judgments.

On October 18, 2007, the Petitioner filed her Petition for Writ of Habeas Corpus with the United States District Court for the Eastern District of Texas, Beaumont Division. (Doc. 1.)

On January 2, 2008 and on January 3, 2008, the Respondent filed its Motion to Dismiss with Brief in Support. (Docs. 7, 9, 10.) On January 3, 2008, the Petitioner filed her Response to Respondent's Motion to Dismiss, Cross-Motion to Strike Respondent's Motion and Cross-Motion for Default Judgment. (Doc. 8.)

On July 8, 2008, the Honorable Keith F. Giblin, United States Magistrate Judge, issued his Report and

Recommendation that the Petition for Writ of Habeas Corpus be dismissed as being barred by the statute of limitations. (Doc. 11.)

On July 10, 2008, the Petitioner filed her Objections to the Report and Recommendation of United States Magistrate Judge. (Doc. 12.)

On September 9, 2009, the Honorable Marcia A. Crone, United States District Judge for the Eastern District of Texas, Beaumont Division, entered a Memorandum and Order adopting the Magistrate Judge's Report and Recommendation, entered a Final Judgment dismissing Petitioner's cause of action and entered an order denying a Certificate of Appealability. (Docs. 13, 14.)

On October 8, 2008, the Petitioner timely filed her Notice of Appeal. (Doc. 16.)

On August 6, 2009, the Fifth Circuit, through Judge Catharina Haynes, entered an order granting the Certificate of Appealability concerning the tolling of the statute of limitations.

On June 10, 2010, the Fifth Circuit entered its *per curiam* opinion affirming the judgment of the district court.

On June 19, 2010, the Petitioner timely filed her Petition for Rehearing *En Banc*.

On July 8, 2010, the Fifth Circuit entered its Order denying the Petition for Rehearing *En Banc*. This present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. In conflict with the decision below, three Circuits have held that when a petitioner has been resentenced, the statute of limitations for a habeas corpus petition begins from the date of the resentencing judgment.

The judgments *nunc pro tunc* entered by the state trial court were "new" judgments that illegally extended the sentence and probation of the Petitioner and effectively resentenced the Petitioner. (1 C.R. 23-26; 2 C.R. 18-21, 22.) *See Harrelson v. State*, Nos. 09-06-00160-CR & 09-06-00161-CR, 2007 WL 685558, at *2 (Tex. App.--Beaumont Mar. 7, 2007, no pet.) (memorandum opinion). When the Court of Appeals for the Ninth Supreme Judicial District of Texas agreed to postconviction review of the propriety of the judgments *nunc pro tunc* entered by the state trial court, the convictions were no longer final for the purposes of 28 U.S.C. § 2244(d)(1)(A). *See Jimenez v. Quarterman*, 129 S.Ct. 681, 683-687 (2009).

The applicable statute of limitations was tolled on March 28, 2006, the date of the entry of the judgments *nunc pro tunc*, and did not begin to run again until the Court of Appeals for the Ninth Supreme Judicial District of Texas reversed and remanded the judgments *nunc pro tunc* on March 7, 2007. *Id.*

The Petition for Writ of Habeas Corpus was filed on October 18, 2007, well within the applicable statute of limitations. (Doc. 1.) Contrary to the reasoning of the Fifth Circuit, three federal circuits have held that once a petitioner has been resentenced, the statute of

limitations for a habeas corpus petition begins to run from the date of the resentencing judgment. *See Linscott v. Rose,* 436 F.3d 587, 591-592 (6th Cir. 2006); *United States v. LaFromboise,* 427 F.3d 680, 683-686 (9th Cir. 2005); *Hepburn v. Moore,* 215 F.3d 1208, 1208-1209 (11th Cir. 2000). The Court is respectfully invited to resolve this conflict in circuit court decisions. The opinion of the Fifth Circuit and the judgment of the district court should be reversed and remanded with instructions to adjudicate the Petition for Writ of Habeas Corpus on the merits.

II. The judgments *nunc pro tunc* illegally extended the sentence and probation period of the Petitioner and actually created new judgments, thus tolling the statute of limitations.

The district court, in its Memorandum Order Overruling Petitioner's Objections and Adopting Magistrate Judge's Report and Recommendation, has stated that the judgments *nunc pro tunc* did not toll the applicable statute of limitations. This Court is respectfully invited to reverse that decision in light of the applicable case law.

The judgments *nunc pro tunc* illegally extended the probation period for the Petitioner and were, in fact, new judgments. *See Harrelson v. State*, Nos. 09-06-00160-CR & 09-06-00161-CR, 2007 WL 685558, at *2 (Tex. App.--Beaumont Mar. 7, 2007, no pet.) (memorandum opinion). Upon the entry of the judgments *nunc pro tunc* by the 253rd Judicial District Court of Liberty County, Texas, the Petitioner was effectively "resentenced" and the applicable statute of limitations began to run from the date the Court of

Appeals for the Ninth Supreme Judicial District of Texas adjudicated the direct appeal from the new sentences. *See, e.g., Jimenez v. Quarterman*, 129 S.Ct. 681, 683-687 (2009); *Hepburn v. Moore*, 215 F.3d 1208, 1209 (11th Cir. 2000). The Petitioner, therefore, has not lost her opportunity to claims relating to her resentencing. *Id.*

The Magistrate Judge has stated on page 4 of his Report and Recommendation that, "[T]his court has not located any authority suggesting that a *nunc pro tunc* judgment allows the defendant to appeal matters relating to the underlying conviction or sentence, or affects the finality of the initial judgment." (Doc. 11.) Quite to the contrary, the Court of Criminal Appeals of Texas has long suggested that a litigant is entitled to appeal the substance of a judgment *nunc pro tunc* and that a litigant waives the assignment of error if he does not appeal the substance of the judgment *nunc pro tunc*. *Cf. Ex parte Lyon*, 296 S.W.2d 262, 262-263 (Tex. Crim App. 1956); *Sarlls v. State*, 230 S.W.2d 225 (Tex. Crim. App. 1950).

The Magistrate Judge has additionally stated there was "no impediment to filing caused by unconstitutional state action." *See* Report and Recommendation, p. 3. (Doc. 11.) This ruling "stands the appellate record from the state courts on its head" and is anathema to the controlling federal and Texas law. The *nunc pro tunc* judgments entered by the 253rd Judicial District Court of Liberty County, Texas in Cause Nos. CR-24515 and CR-24516 on March 28, 2006, did not correct a "clerical error," but in fact illegally extended the length of the sentence and probation of the Petitioner in violation of her Equal Protection and Due Process Rights guaranteed by the

Fourteenth Amendment to the United States Constitution. Counsel can fathom no greater impediment caused by unconstitutional state action. The Court of Appeals for the Ninth Supreme Judicial District of Texas has unanimously agreed with the Petitioner's premise. *See, e.g., Harrelson v. State*, Nos. 09-06-00160-CR & 09-06-00161, 2007 WL 685558, at *2 (Tex. App.--Beaumont Mar. 7, 2007, no pet.) (memorandum opinion).

What is really at issue is whether the *nunc pro tunc* judgments and sentences superseded the original judgments and sentences. The Court in *Ex parte Poe*, 751 S.W.2d 873, 876 (Tex. Crim. App. 1988), succinctly and unambiguously held:

> A nunc pro tunc order may correct clerical errors in a judgment, but not judicial omissions (citations omitted.) A clerical error is one which does result from judicial reasoning or determination. (citation omitted.) Finally, the classification of an error as clerical or judicial is a question of law. (citation omitted.)

(Emphases added).

The Court in *Ex parte Dickerson*, 702 S.W.2d 657, 658 (Tex. Crim. App. 1986), held:

> Thus, a nunc pro tunc entry may be made to correct a judgment to properly reflect the actual order, but may not be used to modify or add additional provisions to an order previously entered.

Contrary to the protestations of the Respondent, the standard in the State of Texas regarding the propriety a *nunc pro tunc* judgment is essentially the same for both civil and criminal cases. The Court in *Home Indemnity Company v. Muncy*, 449 S.W.2d 312, 315-316 (Tex. Civ. App.--Tyler 1969, writ ref'd n.r.e.), succinctly and unambiguously held:

> In determining whether the prior judgment was vacated and annulled, the determining factor is the change made. If the change is judicial in character, that is, if the correction is of what is deemed to be a judicial error, the prior judgment is at least in part set aside and superseded and there is a new and substituted judgment. If the change has the effect of adding something which was omitted by inadvertence so as to portray the judgment actually rendered in the first place, then there is no new judgment but merely a correction of the old one to truly reflect what was actually done.

(Emphasis added) (citations omitted).

Additionally, once a *nunc pro tunc* judgment supersedes and vacates the original judgment, it is the *nunc pro tunc* judgment that is to be enforced. *See Claxton v. (Upper) Lake Fork Water Control & Improvement District No. 1*, 220 S.W.3d 537, 547 (Tex. App.--Texarkana 2006, no pet.); *Bridges v. Wilder*, 80 S.W.2d 1081, 1082 (Tex. Civ. App.--Beaumont 1935, no writ).

It is the Petitioner's contention then and in this Court now that the judgments *nunc pro tunc* entered by the state trial court created "new judgments" which

illegally extended the sentence and probation of the Petitioner, and the Court of Appeals for the Ninth Supreme Judicial District of Texas has so held. *See, e.g., Harrelson*, 2007 WL 685558, at *2. The Court is asked to take judicial notice of the opinion. Since new judgments were entered by the state trial court, the statute of limitations was effectively tolled on March 28, 2006, until the Court of Appeals for the Ninth Supreme Judicial District of Texas completed its review. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(B). The impediment to the filing of this instant petition was removed by the Court of Appeals for the Ninth Supreme Judicial District of Texas on May 7, 2007. The present Petition for Writ of Habeas Corpus was filed well within the applicable state of limitations and any argument to the contrary is without merit and is not supported by the applicable, controlling case law. *Cf. Jimenez v. Quarterman*, 129 S.Ct. 681, 683-687 (2009); *Hepburn v. Moore*, 215 F.3d 1208, 1208-1209 (11th Cir. 2000); *Davis v. Johnson*, 158 F.3d 806, 810-812 (5th Cir. 1998), *cert. denied*, 526 U.S. 1074(1999). The opinion of the Fifth Circuit and the judgment of the district court should be reversed and remanded with instructions to adjudicate the Petition for Writ of Habeas Corpus on the merits.

III. The Fifth Circuit violated the doctrine of *stare decisis* by departing from the mandates of the Supreme Court concerning deference to a state court factual finding involved in a federal habeas corpus proceeding.

The Fifth Circuit is entirely incorrect in stating that the granting of the Certificate of Appealability ("COA") in this case did not encompass the finality of

the Appellant's convictions. Quite to the contrary, that is the gravamen of this case. If new, substantive judgments, which superseded the original judgments, were illegally entered by the state trial court, the statute of limitation is tolled while the post-conviction challenge to the new judgments is completed. Circuit Judge Catharina Haynes recognized this fact when she entered the order granting the COA. *See Harrelson v. Swan*, No. 08-41112 (5th Cir. Aug. 6, 2009) (order granting certificate of appealability) (Appendix "F"). The Fifth Circuit most certainly had the jurisdiction to entertain the Appellant's claims.

Cutting through all of the hyperbole contained in the opinion, the Fifth Circuit totally failed to give substantial deference to the factual holding of the Court of Appeals for the Ninth Supreme Judicial District of Texas. The Court in *Harrelson v. State*, Nos. 09-06-00160-CR & 09-06-00161-CR, 2007 WL 685558, at *2 (Tex. App.--Beaumont Mar. 7, 2007, no pet.) (memorandum op.), succinctly and unambiguously held:

> On this record, the judgments nunc pro tunc were not the proper vehicles to effectuate this Court's mandates. By adding the language requested by the State, **the trial court modified the original judgments**. The modifications were not to correctly reflect the trial court's original judgments, but created **new judgments** effectuating the mandates.

(Emphasis added).

The new judgments effectively and illegally resentenced the Appellant and extended her sentence

and probation period. It is and has always been the Appellant's contention, that for 28 U.S.C. § 2244(d)(1) purposes, the convictions were no longer final and the applicable statute of limitations was tolled until the illegal new judgments were reversed by post-conviction review. *See, e.g., Jimenez v. Quarterman*, 129 S.Ct. 681, 683-687 (2009); *Hepburn v. Moore*, 215 F.3d 1208, 1208-1209 (11th Cir. 2000).

The Court in *Childress v. Johnson*, 103 F.3d 1221, 1225 (5th Cir. 1997), held:

> The recently amended habeas statute sets out the following standard for federal review of state court factual findings: "In a proceeding initiated by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, **a determination of a factual issue made by a State court shall be presumed to be correct**." 28 U.S.C. § 2254(e)(1), . . .

(Emphasis added).

It is very clear that the Fifth Circuit either completely misread the opinion of the Court of Appeals for the Ninth Supreme Judicial District of Texas and the appellate record or chose to deliberately ignore the holding of the Court of Appeals for the Ninth Supreme Judicial District of Texas and the appellate record. Upon either event, the Fifth Circuit chose not to adhere to its own binding precedent as announced in *Childress* relating to deference to a state court factual finding when it did not have the discretion and/or authority to do so by not convening *en banc*.

IV. The panel violated the doctrine of *stare decisis* by departing from the mandate of the Supreme Court concerning the tolling of the AEDPA's statute of limitations.

The Fifth Circuit has held that the appeal of the new judgments entered by the state trial to the Court of Appeals for the Ninth Supreme Judicial District of Texas did not constitute "other collateral review" to toll the statute of limitations. *See* Slip Op. at 4. It is respectfully submitted that the above-stated premises is not the law to be applied.

The Supreme Court in *Holland v. Florida*, No. 09-5327, 2010 WL 2346549, at *3 (U.S. Jun. 14, 2010), held that the time period during which a properly filed application for State **post-conviction review** is pending shall not be counted against the 1-year statute of limitations period.

The Court of Criminal Appeals of Texas has long suggested that a litigant is entitled to appeal the **substance** of a judgment *nunc pro tunc* and that a litigant **waives** the assignment of error if he does not appeal the substance of the judgment *nunc pro tunc*. *Cf. Ex parte Lyon*, 296 S.W.2d 262, 262-263 (Tex. Crim. App. 1956); *Sarlls v. State*, 230 S.W.2d 225 (Tex. Crim. App. 1950). The appeal of the judgments *nunc pro tunc* to the Court of Appeals for the Ninth Supreme Judicial District of Texas is most certainly one type of **post-conviction review** envisioned by the Supreme Court in *Holland*.

This Court went on to hold that the statute of limitations contained in the AEDPA is not jurisdictional in nature and is subject to the doctrine

and principles of equitable tolling. *See Holland*, 2010 WL 2346549, at *9-10.

Lastly, this Court set out the test to determine if a petitioner is entitled to equitable tolling. The petitioner must show: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *See Holland*, 2010 WL 2346549, at *12.

The Petitioner contends that she meets both portions of the test. First, the Petitioner properly and timely filed her post-conviction appeal to challenge the illegal new judgments which lengthened her sentence and probation period and secondly, she was prevented from challenging her convictions in a federal forum until the state post-conviction review was completed. *See Lyon; Sarlls, supra*.

The district court and, in turn, the panel of this Court relied on an overly rigid and *per se* approach in considering the doctrine and principle of equitable tolling.

V. The State of Texas is judicially estopped from challenging the legal and factual findings of Court of Appeals for the Ninth Supreme Judicial District of Texas pursuant to the "law of the case doctrine."

It is the contention of the Petitioner that the State of Texas has waived its arguments and is judicially estopped from asserting that the *judgments nunc pro tunc* issued by the state trial court were not "new judgments" that illegally resentenced the Petitioner. *See Harrelson*, 2007 WL 685558, at *2.

The Court of Appeals for the Ninth Supreme Judicial District of Texas specifically held that by entering *judgments nunc pro tunc*, the state trial court illegally entered "new judgments." This Court is requested to take judicial notice that the State of Texas did not challenge the opinion and judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas. The State of Texas did not seek a rehearing with the Court of Appeals for the Ninth Supreme Judicial District of Texas nor did the State of Texas file a Petition for Discretionary Review with the Court of Criminal Appeals of Texas. Thus, the State of Texas is bound by the "law of the case doctrine" and cannot now challenge the findings contained in the opinion and judgment of the Court of Appeals for the Ninth Supreme Judicial District of Texas.

The "'law of the case'" doctrine provides that "'appellate court's resolution of a question of law in a previous appeal of the same case will govern the deposition of the same issue when raised in a subsequent appeal.'" *Carroll v. State*, 101 S.W.3d 454, 461 (Tex. Crim. App. 2003) (citing *Ware v. State*, 736 S.W.2d 700, 701 (Tex. Crim. App. 1987)). *See also Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999); *Lee v. State*, 148 S.W. 706, 713 (Tex. Crim. App. 1912).

Moreover, the Supreme Court of the United States and the Fifth Circuit have held that the "law of the case doctrine" applies when a court decides upon a rule of law, that decision should govern the same issue in subsequent stages in the same case. *See Arizona v. California*, 460 U.S. 605 (1983); *United States v. Palmer*, 122 F.3d 215, 220 (5th Cir. 1997). Lastly, the "law of the case doctrine" applies to both civil and

criminal federal proceedings. *See Paul v. United States*, 734 F.2d 1064, 1066 (5th Cir. 1984). The arguments of the State of Texas contained in the Brief of Respondent-Appellee in the court below have been judicially waived and are moot. *Cf. Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217, n.3 (6th Cir. 1990) (the "purpose of judicial estoppel . . . is designed to prevent parties from contradicting a prior court determination, not themselves."). The opinion of the Fifth Circuit and the judgment of the district court should be reversed and remanded with instructions to adjudicate the Petition for Writ of Habeas Corpus on the merits.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the June 10, 2010 Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41112

[Filed June 10, 2010]

JANET HARRELSON,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
STEVE SWAN, Chief Probation Officer, Liberty-Chambers Counties Community Supervision & Corrections Department,	)
	)
Respondent-Appellee	)
	)

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:07-CV-742

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Janet Harrelson, Texas prisoner # 02288819, filed a 28 U.S.C. § 2254 petition challenging her conviction of forgery and tampering with a governmental record. The district court denied Harrelson's petition as untimely, and this court granted Harrelson a certificate of appealability (COA) limited to the issue whether the filing of nunc pro tunc proceedings constituted collateral proceedings that tolled the limitation period under 28 U.S.C. § 2244(d)(2). We now AFFIRM.

Harrelson was convicted in 2003 and sentenced in two judgments to concurrent probated terms of incarceration. The conviction became final on December 9, 2005, when the time expired for her to seek certiorari in the United States Supreme Court from the denial of a petition for discretionary review by the Texas Court of Criminal Appeals. *See Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003). In accord with Texas state law governing probated sentences, the terms of Harrelson's community supervision commenced when the state court issued its mandate shortly thereafter. *See Surety Corp. of Am. v. State*, 550 S.W.2d 689, 690 (Tex. Crim. App. 1977). The State then sought entry of judgments nunc pro tunc to reflect that Harrelson's sentence began upon the date of the mandate's issuance, and the trial court granted the motion. Harrelson appealed, arguing that the nunc pro tunc judgments were void because they implied

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that she had violated her probation. On March 7, 2007, the state appellate court reversed because the nunc pro tunc judgments did not merely correct a clerical error and were improper.

Harrelson filed her § 2254 petition challenging her conviction on October 18, 2007, more than one year after her conviction became final on December 9, 2005. The petition is untimely on its face unless the nunc pro tunc proceedings tolled the limitations period of the Antiterrorism and Effective Death Penalty Act (AEDPA).

Harrelson argues that the nunc pro tunc judgments reopened her underlying conviction so that the conviction was not final until the state appellate court corrected the judgments. She relies on 28 U.S.C. § 2244(d)(1)(A) and *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009). *Jimenez* held narrowly that "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)." *Id.* at 686. This court's grant of COA did not encompass the finality of Harrelson's conviction under § 2244(d)(1)(A), but rather whether the nunc pro tunc proceedings constituted collateral review under § 2244(d)(2), a very different statutory provision. We therefore lack jurisdiction to consider Harrelson's argument. *See Carty v. Thaler*, 583 F.3d 244, 266 (5th Cir. 2009).

Under § 2244(d)(2), the AEDPA's limitations period is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim

is pending[.]" Harrelson, who is represented by counsel, does not provide a clear explanation, with supporting authorities, of why the nunc pro tunc proceedings here meet the definition of an "other collateral proceeding" that tolls the limitations period. We may conclude, therefore, that Harrelson has inadequately briefed and abandoned the only issue for which a COA was granted. *See* FED. R. APP. P. 28(a)(9); *Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *see also Beasley v. McCotter*, 798 F.2d 116, 118 (5th Cir. 1986) (noting that liberal construction is not afforded to parties who are represented by counsel before this court).

Furthermore, even if we were to reach the issue we would conclude that the nunc pro tunc proceedings did not toll the limitations period and that Harrelson's arguments to the contrary are unavailing. Harrelson argues that the state trial court entered "new" judgments in the nunc pro tunc proceedings that effectively tolled the limitations period until resolution of her appeal. Merely because the trial court entered a subsequent judgment, however, does not necessarily mean that the proceedings constituted collateral review of Harrelson's original judgments of conviction.

In order to toll the limitations period under § 2244(d)(2), the proceedings at issue must at least have sought "review" of the judgments pursuant to which Harrelson was in custody. *See Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002). "Review" means, *inter alia*, "to *reexamine* judicially'" and "to *go over* or *examine* critically or deliberately." *Id.* (quotation and citation omitted) (emphasis in original). In Texas, a nunc pro tunc entry of judgment is proper to correct clerical errors in the judgment in order to reflect the

judgment as it was actually ordered by the trial court at the time of trial but that for some reason was not entered properly. *Ex Parte Poe*, 751 S.W.2d 873, 876 (Tex. Crim. App. 1988). The State sought the nunc pro tunc judgments here to effectuate the mandate after Harrelson's conviction was affirmed on direct appeal. Although Harrelson is correct that she was permitted to appeal from the trial court's order, her right of appeal was "limited to the validity of the nunc pro tunc entry." *Moore v. State*, 446 S.W.2d 878, 879 (Tex. Crim. App. 1969). Consistent with that principle, Harrelson's appeal sought a ruling that the nunc pro tunc judgments were erroneous because, rather than correcting a clerical error, they implied that she had violated her probation. The state appellate court held only that the nunc pro tunc judgments were "not the proper vehicles to effectuate this Court's mandates." *Harrelson v. State*, 2007 WL 685558, at *2 (Tex. Ct. App. 2007). Harrelson did not seek, nor did the state appellate court supply, review of Harrelson's original judgments. In fact, during the pendency of the nunc pro tunc proceedings, Harrelson had sought review of her original conviction and judgment in separate state habeas proceedings, which were ultimately unsuccessful. The propriety of the original judgments through judicial reexamination had nothing to do with the nunc pro tunc proceedings and appeal, although the original judgments by necessity were germane to the case. *See Moore*, 298 F.3d at 367. We conclude, therefore, that the nunc pro tunc proceedings did not constitute "other collateral review" of Harrelson's conviction and did not toll the limitations period. *See* § 2244(d)(2).

The district court's judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-41112
D.C. Docket No. 1:07-CV-742

[Filed June 10, 2010]

JANET HARRELSON,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
STEVE SWAN, Chief Probation Officer, Liberty-Chambers Counties Community Supervision & Corrections Department,	)
	)
Respondent-Appellee	)
	)

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

A True Copy
Attest
Clerk, U.S. Court of Appeals, Fifth Circuit
By: _____
Deputy
New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. 1:07-CV-742

[Filed September 9, 2008]

JANET HARRELSON,	)
	)
Petitioner,	)
	)
versus	)
	)
STEVE SWAN,	)
	)
Respondent.	)
	)

MEMORANDUM ORDER OVERRULING PETITIONER'S OBJECTIONS AND ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Janet Harrelson, proceeding through counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The court ordered that this matter be referred to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders

of this court. The magistrate judge has submitted a Report and Recommendation of United States Magistrate Judge. The magistrate judge recommends dismissing the petition as barred by the statute of limitations.

The court has received and considered the Report and Recommendation of United States Magistrate Judge, along with the record, pleadings, and all available evidence. Petitioner filed objections to the magistrate judge's Report and Recommendation.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes the objections are without merit. The cases cited by petitioner do not support her proposition that the statute of limitations began to run when the *nunc pro tunc* judgments were entered. Because petitioner challenges the underlying convictions and sentences, the statute of limitations began to run when the original judgments became final.

The petitioner is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the petitioner to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463U.S. 880, 893(1982). In

making that substantial showing, the petitioner need not establish that she should prevail on the merits. Rather, she must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84. If the petition was denied on procedural grounds, the petitioner must show that jurists of reason would find it debatable: (1) whether the petition raises a valid claim of the denial of a constitutional right and (2) whether the district court was correct in its procedural ruling. *Id.* at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000).

Here, the petitioner has not shown that any of the issues raised by her claims are subject to debate among jurists of reason, or that the procedural ruling was incorrect. Therefore, the petitioner has failed to make a sufficient showing to merit the issuance of a certificate of appealability. Accordingly, a certificate of appealability shall not be issued.

ORDER

Accordingly, petitioner's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct, and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance

with the magistrate judge's recommendation. A certificate of appealability shall not be issued.

SIGNED at Sherman, Texas, this 9th day of September, 2008.

/s/Marcia A. Crone
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. 1:07-CV-742

[Filed September 9, 2008]

JANET HARRELSON,	)
	)
Petitioner,	)
	)
versus	)
	)
STEVE SWAN,	)
	)
Respondent.	)
	)

FINAL JUDGMENT

This action came on before the Court, Honorable Marcia A. Crone, District Judge, presiding, and, the issues having been considered and a decision having been rendered, it is

ORDERED and **ADJUDGED** that this petition for writ of habeas corpus is **DISMISSED**. A certificate of appealability shall not be issued. All motions not previously ruled on are hereby **DENIED**.

SIGNED at Sherman, Texas, this 9th day of September, 2008.

/s/Marcia A. Crone
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. 1:07-CV-742

[Filed July 8, 2008]

JANET HARRELSON	)
	)
VS.	)
	)
STEVE SWAN	)
	)

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Janet Harrelson, proceeding through counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The above-styled action was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Factual Background

Petitioner is serving two probated sentences pursuant to judgments entered in the 253rd Judicial District Court of Liberty County, Texas. Petitioner was indicted for the offenses of abuse of official capacity in cause number CR24514; forgery in CR24515; and two charges of tampering with a governmental record in CR24516 and CR24518. Following a jury trial, petitioner was found guilty of each charge. On October 22, 2003, petitioner was sentenced to sixty days of imprisonment in CR24514; ten years of imprisonment, probated for ten years, in CR24515; and two years, probated for five years, in CR24516 and CR24518. The court also imposed fines and restitution with respect to each charge.

Petitioner appealed the convictions. On December 22, 2004, the Ninth Court of Appeals affirmed the convictions for forgery in CR24515 and tampering with a governmental record in CR24516. The judgments in the other two cases were reversed after the appellate court concluded that the evidence was legally insufficient to sustain the convictions. The Texas Court of Criminal Appeals refused the petition for discretionary review. On December 9, 2005, the Court denied petitioner's request for rehearing.

Petitioner filed state applications for habeas relief on May 8, 2006. The Texas Court of Criminal Appeals denied the applications on June 7, 2006.

The Petition

Petitioner filed this petition for writ of habeas corpus on October18, 2007. Petitioner alleges that, as

a matter of law, she did not commit the offenses of forgery or tampering with a government document. Petitioner also contends that her attorney provided ineffective assistance of counsel.

Analysis

Title 28 U.S.C. § 2254 authorizes the district court to entertain a petition for writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment if the prisoner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). There is a one year statute of limitations on federal petitions for writ of habeas corpus brought by state prisoners. 28 U.S.C. § 2244(d). The limitation period begins to run from the latest of: (1) the date on which the judgment became final; (2) the date on which an impediment to filing created by unconstitutional state action was removed; (3) the date on which the United States Supreme Court initially recognized the constitutional right if the right is retroactively applicable to cases on collateral review; or (4) the date on which the factual predicate of the claim could have been discovered by due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). The amendment also provides that the statute of limitations is tolled while a state post-conviction review or other collateral attack is pending. 28 U.S.C. § 2244(d)(2).

Here, there was no impediment to filing caused by unconstitutional state action, petitioner does not rely on a newly recognized constitutional right, and she could have discovered the factual predicate of her claims beforethe conviction became final. Therefore, the limitations period began to run on the date on which the judgment became final. Because petitioner

did not file a petition for writ of certiorari, the judgment became final on March 9, 2006. *Ott v. Johnson*, 192 F.3d 510, 513 (holding that state conviction becomes final upon denial of certiorari by the United States Supreme Court or expiration of the time period for seeking certiorari). The limitations period began to run the next day. Petitioner tolled the limitations period by filing her state habeas application on May 8, 2006. When the application was dismissed on June 7, 2006, petitioner had three hundred and six days in which to file her federal petition. The limitations period expired April 9, 2007, six months before petitioner filed this petition.

Petitioner argues that the judgments entered on October 22, 2003 are not final judgments because *nunc pro tunc* judgments were entered on March 28, 2006. The judgments added the following language: "Defendant appealed. Judgment of conviction affirmed. Mandate executed on December 27, 2005. Sentence begin date: December 27, 2005." The Ninth Court of Appeals found that the trial court erred, and reversed the *nunc pro tunc* judgments on March 7, 2007. Petitioner contends that the limitations period did not begin to run until the *nunc pro tunc* judgments were reversed.

Under Texas law, a *nunc pro tunc* judgment simply corrects the written record to show the true judgment of the court. *Alvarez v. State*, 605 S.W.2d 615 (Tex. Crim. App. 1980). The defendant may appeal the *nunc pro tunc* judgment itself. *Shaw v. State*, 539S.W.2d887 (Tex. Crim. App. 1976). However, this court has not located any authority suggesting that a *nunc pro tunc* judgment allows the defendant to appeal matters relating to the underlying conviction or sentence, or

affects the finality of the initial judgment. As petitioner's complaints relate to her original convictions, the completion of direct review of those convictions is the controlling date for determining when the judgments became final. In addition, petitioner is not entitled to statutory tolling while the *nunc pro tunc* judgments were on appeal because the appeal was not a "postconviction or other collateral review with respect to the pertinent judgment or claim." 28 U.S.C. § 2244(d)(2).

In *Davis v. Johnson*, the United States Court of Appeals for the Fifth Circuit held that "the limitations period does not circumscribe federal jurisdiction, and can be equitably tolled in appropriate, albeit extraordinary circumstances." *Davis v. Johnson*, 158 F.3d 806, 807 (5th Cir. 1998). Equitable tolling may be available if the petitioner is actively misled by the respondent about the cause of action or is prevented in some extraordinary way from asserting his rights. *Melancon v. Kaylo*, 259 F.3d 401, 408 (5th Cir. 2001). Attorney error or neglect is not an extraordinary circumstance justifying the application of equitable tolling. *Salinas v. Dretke*, 354 F.3d 425, 432 (5th Cir.), *cert. denied*, 541 U.S. 1032 (2004). Ignorance of the law, even for a*pro se* prisoner, does not generally warrant equitable tolling. *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999). Further, equitable tolling should only be applied if the applicant diligently pursues relief. *Melancon*, 259 F.3d at 408.

Petitioner has not shown rare and extraordinary circumstances warranting equitable tolling. She was not actively misled by respondent about her cause of action, or prevented from asserting her rights. This

petition for writ of habeas corpus is barred by the statute of limitations, and should be dismissed.

Recommendation

This petition for writ of habeas corpus should be dismissed.

Objections

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 8 day of July, 2008.

/s/KEITH F. GIBLIN
KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41112

[Filed July 8, 2010]

JANET HARRELSON,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
STEVE SWAN, Chief Probation Officer, Liberty-Chambers Counties Community Supervision & Corrections Department,	)
	)
Respondent-Appellee	)

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING EN BANC

(Opinion June 10, 2010, 5 Cir., _____, _____, F.3d _____)

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(✗) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

REHG6A

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-41112
USDC No. 1:07-CV-742

[Filed August 6, 2009]

JANET HARRELSON,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
STEVE SWAN, Chief Probation Officer, Liberty-Chambers Counties Community Supervision & Corrections Department,	)
	)
Respondent-Appellee	)

Appeal from the United States District Court for the Eastern District of Texas

ORDER:

Janet Harrelson, Texas prisoner #02288819, is seeking a certificate of appealability (COA) to appeal the district court's dismissal of her 28 U.S.C. § 2254 habeas petition challenging her convictions for forgery and tampering with a governmental record. Harrelson

argues that the district court erred in dismissing the petition because proceedings involving the entry of a nunc pro tunc judgment, including her appeal from that judgment, were collateral proceedings that tolled the limitation period.

A COA may issue only if Harrelson has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's denial of habeas relief is based upon procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Pursuant to 28 U.S.C. § 2244(d)(2), the period during which a properly filed application for state postconviction relief or other collateral review with respect to the pertinent judgment or claim is pending is not counted toward the one-year statutory limitation period of § 2244(d)(1). Reasonable jurists could disagree whether the nunc pro tunc proceedings constituted collateral proceedings that tolled the limitation period pursuant to § 2244(d)(2). *Slack,* 529 U.S. at 484.

In alleging her underlying claims of legal insufficiency of the evidence and ineffective assistance of counsel, we cannot conclude on this abbreviated record that Harrelson has not made a substantial showing of the denial of a constitutional right. *Id.; Houser v. Dretke,* 395 F.3d 360, 362 (5th Cir. 2004). Accordingly, a COA is GRANTED as to whether the

filing of the motion for a nunc pro tunc judgment and the subsequent appeal from the trial court's order granting the motion were collateral proceedings that tolled the limitation period of § 2244(d).

August 6, 2009

/s/ Catharina Haynes
Catharina Haynes
UNITED STATES CIRCUIT JUDGE

APPENDIX G

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX I

28 U.S.C. § 2244
Effective: April 24, 1996

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant

shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 965; Nov. 2, 1966, Pub.L. 89-711, § 1, 80 Stat. 1104; Apr. 24, 1996, Pub.L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220.)

Current through PL 111-239 (excluding P.L. 111-203) approved 9-27-10